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No. 83-1651

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In the Supreme Court of the United States

OCTOBER TERM, 1983

JEFFREY PHILLIP KAMRIN, PETITIONER

v.

UNITED STATES OF AMERICA

*ON PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS FOR
THE NINTH CIRCUIT*

**MEMORANDUM FOR THE UNITED STATES
IN OPPOSITION**

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Petitioner contends that the federal statute of limitations, 18 U.S.C. 3282, and the Due Process Clause bar his extradition to Australia.

1. Following a hearing conducted before a United States magistrate in the Western District of Washington pursuant to 18 U.S.C. 3184, petitioner was certified to the Secretary of State as being subject to extradition to Australia (Pet. App. 1g-3g). Petitioner challenged the certification of extraditability by filing a petition for a writ of habeas corpus in the district court. The district court denied relief and the court of appeals affirmed (Pet. App. 1a-5a; 725 F.2d 1225).

Petitioner is a citizen of the United States who has resided here since 1975 (Pet. App. 2a). In December 1980, petitioner was charged in Australia with conspiracy to cheat

and defraud and with defrauding persons by making willfully false pretenses regarding investments in car wash franchises between March 1972 and December 1974 (*ibid.*). In 1982, Australia requested petitioner's extradition under the Treaty on Extradition, May 14, 1974, United States-Australia, 27 U.S.T. 957 (Pet. App. 2a, 3e).¹

At the hearing before the magistrate, petitioner stipulated that (1) he is the person named in the charges that are the subject of the extradition request; (2) the extradition documents submitted by Australia to support its request establish probable cause; and (3) the offenses charged are punishable by terms of imprisonment of at least one year by the respective laws of the United States and Australia (Pet. App. 1g). Petitioner claimed, however, that his extradition is barred by the five-year federal statute of limitations, 18 U.S.C. 3282, because more than five years elapsed between the date of the offenses and the date petitioner was charged. Australia has no statute of limitations for those offenses (Pet. App. 2a). The magistrate rejected petitioner's claim (Pet. App. 1g-3g), and the district court denied a petition for a writ of habeas corpus seeking review of the magistrate's certification of extraditability.

The court of appeals affirmed (Pet. App. 1a-5a). The court rejected petitioner's contention that the federal statute of limitations bars his extradition. It noted that "Article VII of the Treaty provides that '[e]xtradition shall not be granted . . . when the prosecution for the offense has become barred by lapse of time according to the laws of the *requesting state*' " (Pet. App. 3a (court's emphasis)). The court pointed out that petitioner's prosecution "is not time-barred in Australia, the requesting state here" (*ibid.*). In

¹Pursuant to Article XX (27 U.S.T. 973), the Treaty applies to offenses committed before, on, or after the date on which it entered into force (Pet. App. 17b).

addition, the court observed that, as a general matter, absent a specific treaty provision, the statute of limitations may be raised as a defense only after the defendant's return to the requesting state. *Ibid.* (citing *Merino v. United States Marshal*, 326 F.2d 5 (9th Cir. 1963), cert. denied, 377 U.S. 997 (1964); *Freedman v. United States*, 437 F. Supp. 1252, 1263 (N.D. Ga. 1977)). The court noted, in this regard, that "[i]t may not always be clear whether a prosecution is time-barred, and the general rule allows the prosecuting state to resolve the issue" (Pet. App. 3a). Accordingly, the court concluded that, "[g]iven the general rule, the absence of a contrary provision should be interpreted as an intention by the party states that the statute of limitation of the requested state does not apply" (*ibid.*).²

The court of appeals also rejected petitioner's claim that Article X of the Treaty (27 U.S.T. 966), which guarantees that " 'the person whose extradition is sought shall have the right to use such remedies and recourses as are provided by [the law of the requested state], ' * * * entitles him to the due process right that underlies United States statutes of limitations" (Pet. App. 4a). The court held (*id.* at 4a-5a), in reliance on *Neely v. Henkel*, 180 U.S. 109 (1901), and *Holmes v. Laird*, 459 F.2d 1211 (D.C. Cir.), cert. denied, 409 U.S. 869 (1972), that petitioner cannot challenge his extradition on the ground that the requesting nation does not offer the same rights and privileges he can claim under United States law.

2. a. Petitioner appears to contend (Pet. 9-10) that his offense does not satisfy the "dual criminality" requirement of the United States-Australia Extradition Treaty because

²The court of appeals pointed out that "delay in seeking extradition may be relevant to the Secretary of State's final determination as to whether extradition may go forward," but it stated that such delay "may not * * * serve as a defense to judicial extradition proceedings" (Pet. App. 3a).

the United States would be barred by 18 U.S.C. 3282 from prosecuting him. Under the dual criminality requirement of the Treaty, an offense for which extradition is sought must be punishable under the laws of both contracting parties by at least one year's imprisonment or by death. Petitioner's theory apparently is that the offenses of which he has been charged in Australia would not be punishable in the United States because they are outside the federal statute of limitations.

This contention is insubstantial. Contrary to the unstated assumption underlying petitioner's contention, the statute of limitations is not an element of an offense. See *United States v. Doyle*, 348 F.2d 715, 718 (2d Cir.), cert. denied, 382 U.S. 843 (1965); *Freedman v. United States*, 437 F. Supp. at 1264. Thus, even though the United States would be barred from prosecuting petitioner on the charges—just as it would be barred from prosecuting for lack of a proper venue—that fact has no bearing on whether petitioner's conduct constitutes an offense under the laws of the United States for purposes of construing the dual criminality provision of the Extradition Treaty.³

b. Petitioner also asserts (Pet. 10) that the language of Article VII (27 U.S.T. 965) — conditioning extradition upon the limitations period of the requesting state — “is pregnant with implication that it was anticipated that Australia would adopt a statute of limitations.” Petitioner

³Article VI of the Treaty (27 U.S.T. 964), on which petitioner purports to rely, does not assist him. Article VI requires only that there be sufficient evidence, according to the laws of the requested state, to justify trial or commitment for trial of the extraditee. Similar provisions in other treaties have repeatedly been construed to require a showing of probable cause to believe that the extraditee has committed the offenses with which he has been charged. See, e.g., *Eain v. Wilkes*, 641 F.2d 504, 507-508 (7th Cir.), cert. denied, 454 U.S. 894 (1981). Petitioner has conceded the existence of probable cause. See page 2, *supra*.

therefore requests this Court to "impute a reasonable period of limitations to Australia" (Pet. 10); otherwise, petitioner warns, the Treaty would not "effect the apparent intention of the parties to secure equality and reciprocity between them." *Factor v. Laubenheimer*, 290 U.S. 276, 293 (1933).

Petitioner's extraordinary request is patently frivolous. The clear intent of the Treaty partners in Article VII was to ensure that each partner would have no greater and no lesser right to pursue a prosecution of an extradited defendant than it would of one apprehended within its own borders. Conditioning extradition on the limitations provision of the requesting state effects that intent. But there is nothing in the Treaty that requires either requesting state to enact a limitations statute.

The power of international extradition is solely the creature of treaty, and it is the sovereign that determines the conditions for extradition. If it chose, the United States could agree to extradite a person for an act that is not unlawful in this country. See *Gallina v. Fraser*, 278 F.2d 77, 79 (2d Cir.), cert. denied, 364 U.S. 851 (1960); cf. *Factor v. Laubenheimer*, 290 U.S. at 299-300. The United States has not chosen to condition extradition to Australia upon Australia's compliance with the limitations statute of the United States. It is certainly neither the responsibility nor the prerogative of the courts to "impute a reasonable period of limitations to Australia," as petitioner suggests (Pet. 10).⁴

c. Petitioner appears to rely (Pet. 11) on Article X of the Treaty (27 U.S.T. 966) in support of his claim that he can

⁴As the court of appeals observed (Pet. App. 3a), petitioner's complaint concerning the delay in seeking his extradition is more appropriately addressed to the Secretary of State, who will make the final determination whether to surrender petitioner to Australian authorities. See *Freedman v. United States*, 437 F. Supp. at 1264.

invoke the federal statute of limitations and the Due Process Clause of the United States Constitution as a bar to his extradition.⁵ Because the provision refers to "remedies and recourses," petitioner argues (Pet. 11 (emphasis added)) that it entitles him "to take advantage of *any* remedies and recourses and rights provided to him under the laws of the United States." Petitioner's argument is based on a misreading of the Treaty.

Article X simply declares that the law of the requested state governs whether extradition shall be granted and that a person whose extradition is sought shall be permitted to avail himself of whatever procedures are prescribed by the law of the requested state. Thus, Article X entitled petitioner to have his case considered in accordance with the provisions of 18 U.S.C. 3181-3195, which govern extradition proceedings, and to seek whatever review the laws of the United States provide. The process that is due a person in an extradition proceeding, however, is not identical to the process accorded a defendant prosecuted for violations of federal criminal law.⁶ Article X ensures that a person in petitioner's position will be accorded the process due to the subject of an extradition request; it does not authorize this or any other court to survey Australian criminal procedure for compliance with the Due Process Clause of the United States Constitution.

⁵Article X provides (Pet. App. 10b):

The determination that extradition based upon the request therefor should or should not be granted shall be made in accordance with the law of the requested State and the person whose extradition is sought shall have the right to use such remedies and recourses as are provided by that law.

⁶For example, an extraditee is not granted a direct appeal from a certification of extraditability. Instead, he must seek review by way of a petition for habeas corpus, and the reviewing court has a very limited scope of review. *Fernandez v. Phillips*, 268 U.S. 311, 312 (1925); *Collins v. Miller*, 252 U.S. 364, 369 (1920).

As the court of appeals concluded (Pet. App. 4a-5a), petitioner's argument is contrary to this Court's holding in *Neely v. Henkel*, 180 U.S. 109 (1901). There, a United States citizen challenged the constitutionality of his extradition to a foreign country that did not provide an accused all the rights, privileges and immunities of the United States Constitution. The Court's response then is equally applicable now (180 U.S. at 123):

[Petitioner's United States] citizenship does not give him an immunity to commit crime in other countries, nor entitle him to demand, of right, a trial in any other mode than that allowed to its own people by the country whose laws he has violated and from whose justice he has fled. When an American citizen commits a crime in a foreign country he cannot complain if required to submit to such modes of trial and to such punishment as the laws of that country may prescribe for its own people, unless a different mode be provided for by treaty stipulations between that country and the United States.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

REX E. LEE
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